

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

THOMAS D. JENSEN,

Plaintiff

v.

JAMES DZURENDA, et al.,

Defendants

Case No.: 3:19-cv-00178-MMD-CSD

**Report & Recommendation of
United States Magistrate Judge**

Re: ECF No. 60

This Report and Recommendation is made to the Honorable Miranda M. Du, Chief United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Before the court is Defendants' motion for summary judgment. (ECF Nos. 60, 60-1 to 60-17, 63-1 (errata)). Plaintiff filed a response. (ECF No. 66.) Defendants did not file a reply.

After a thorough review, it is recommended that Defendants' motion be granted in part and denied in part.

I. BACKGROUND

Plaintiff is an inmate in the custody of the Nevada Department of Corrections (NDOC), proceeding pro se with this action pursuant to 42 U.S.C. § 1983. (Am. Compl., ECF No. 43.) The events giving rise to this action took place while Plaintiff was housed at Northern Nevada Correctional Center (NNCC). (*Id.*)

The court screened Plaintiff's complaint, and he subsequently filed an amended complaint pursuant to a stipulation. (ECF Nos. 3, 41, 43.) Various defendants and claims have been dismissed, and the claims remaining are: (1) retaliation, First Amendment Free Exercise and equal protection claims against Edmond Mason; (2) a retaliation claim against John

1 Cardella; and (3) retaliation, Eighth Amendment failure to protect and First Amendment legal
2 mail claims against Victor Lobato. (*See* ECF Nos. 3, 22, 46, 49, 64, 65.)

3 Plaintiff alleges that Mason retaliated against him by having him fired from his job after
4 Plaintiff filed a complaint against Mason for discrimination. Plaintiff further avers that to
5 practice his Lakota religion and participate in the sweat ceremony he had to obtain a staff
6 sponsor, but Mason dissuaded staff from becoming the Native American sponsor, and thus
7 prevented Plaintiff from practicing his religion. Plaintiff's equal protection claim contends
8 Mason did this because he did not like Native Americans or their religion.

9 Plaintiff alleges that Cardella retaliated by filing false charges against Plaintiff.

10 Plaintiff avers that Lobato retaliated against him by orchestrating an inmate attack on
11 Plaintiff, and the inmate did attack Plaintiff, and Lobato witnessed the attack but did nothing to
12 intervene. Finally, Plaintiff contends that in November of 2017, Lobato purposefully read
13 Plaintiff's legal mail outside his presence and then routed it back to Plaintiff through the regular
14 mail.

15 Defendants move for summary judgment, arguing: (1) they did not participate in any
16 constitutional violation; (2) they did not retaliate against Plaintiff; (3) Mason did not violate
17 Plaintiff's free exercise rights because there is no evidence he precluded Plaintiff from obtaining
18 Native American sponsors; (4) Lobato did not violate his First Amendment legal mail rights
19 because there is no evidence to support that Plaintiff's legal mail was opened outside his
20 presence; (5) Lobato did not orchestrate an attack on Plaintiff or fail to take action when the
21 attack occurred as he did not see the attack; (6) Mason did not treat Plaintiff differently than
22 similarly situated inmates because all religious groups must have a sponsor to conduct religious
23

activities; (7) Defendants are entitled to qualified immunity; and (8) Plaintiff failed to exhaust administrative remedies as to certain claims.

II. LEGAL STANDARD

The legal standard governing this motion is well settled: a party is entitled to summary judgment when “the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Cartrett*, 477 U.S. 317, 330 (1986) (citing Fed. R. Civ. P. 56(c)). An issue is “genuine” if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A fact is “material” if it could affect the outcome of the case. *Id.* at 248 (disputes over facts that might affect the outcome will preclude summary judgment, but factual disputes which are irrelevant or unnecessary are not considered). On the other hand, where reasonable minds could differ on the material facts at issue, summary judgment is not appropriate. *Anderson*, 477 U.S. at 250.

“The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court.” *Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted); *see also Celotex*, 477 U.S. at 323-24 (purpose of summary judgment is “to isolate and dispose of factually unsupported claims”); *Anderson*, 477 U.S. at 252 (purpose of summary judgment is to determine whether a case “is so one-sided that one party must prevail as a matter of law”). In considering a motion for summary judgment, all reasonable inferences are drawn in the light most favorable to the non-moving party. *In re Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citation omitted); *Kaiser Cement Corp. v. Fischbach & Moore Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). That being said, “if the evidence of the nonmoving party “is not significantly probative, summary judgment may be granted.” *Anderson*,

1 477 U.S. at 249-250 (citations omitted). The court's function is not to weigh the evidence and
2 determine the truth or to make credibility determinations. *Celotex*, 477 U.S. at 249, 255;
3 *Anderson*, 477 U.S. at 249.

4 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.
5 “When the party moving for summary judgment would bear the burden of proof at trial, ‘it must
6 come forward with evidence which would entitle it to a directed verdict if the evidence went
7 uncontroverted at trial.’ ... In such a case, the moving party has the initial burden of establishing
8 the absence of a genuine [dispute] of fact on each issue material to its case.” *C.A.R. Transp.*
9 *Brokerage Co. v. Darden Rest., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations
10 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or
11 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
12 an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
13 party cannot establish an element essential to that party’s case on which that party will have the
14 burden of proof at trial. *See Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-25 (1986).

15 If the moving party satisfies its initial burden, the burden shifts to the opposing party to
16 establish that a genuine dispute exists as to a material fact. *See Matsushita Elec. Indus. Co. v.*
17 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a genuine
18 dispute of material fact conclusively in its favor. It is sufficient that “the claimed factual dispute
19 be shown to require a jury or judge to resolve the parties’ differing versions of truth at trial.”
20 *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987)
21 (quotation marks and citation omitted). The nonmoving party cannot avoid summary judgment
22 by relying solely on conclusory allegations that are unsupported by factual data. *Matsushita*, 475
23 U.S. at 587. Instead, the opposition must go beyond the assertions and allegations of the

1 pleadings and set forth specific facts by producing competent evidence that shows a genuine
2 dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

3 **III. DISCUSSION**

4 **A. Exhaustion**

5 Defendants argue that Plaintiff failed to exhaust his retaliation claim against Cardella, as
6 well as his retaliation, failure to protect, and legal mail claims against Lobato.

7 **1. Exhaustion Standard**

8 The Prison Litigation Reform Act (PLRA) provides that “[n]o action shall be brought
9 with respect to prison conditions under section 1983 of this title, or any other Federal law, by a
10 prisoner confined in any jail, prison, or other correctional facility until such administrative
11 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). An inmate must exhaust his
12 administrative remedies irrespective of the forms of relief sought and offered through
13 administrative avenues. *Booth v. Churner*, 532 U.S. 731, 741 (2001).

14 The failure to exhaust administrative remedies is “an affirmative defense the defendant
15 must plead and prove.” *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (quoting *Jones v.*
16 *Bock*, 549 U.S. 199, 204, 216 (2007)).

17 Once a defendant shows that the plaintiff did not exhaust available administrative
18 remedies, the burden shifts to the plaintiff “to come forward with evidence showing that there is
19 something in his particular case that made the existing and generally available administrative
20 remedies effectively unavailable to him.” *Id.* at 1172 (citing *Hilao v. Estate of Marcos*, 103 F.3d
21 767, 778 n. 5 (9th Cir. 1996)); *Draper v. Rosario*, 836 F.3d 1072, 1080 (9th Cir. 2016) (inmate
22 plaintiff did not meet his burden when he failed to identify any actions prison staff took that
23 impeded his ability to exhaust his administrative remedies, or otherwise explain why he failed to

1 comply with the administrative remedies process)). The ultimate burden of proof, however,
2 remains with the defendant. *Id.*

3 Exhaustion cannot be satisfied by filing an untimely or otherwise procedurally infirm
4 grievance, but rather, the PLRA requires “proper exhaustion.” *Woodford v. Ngo*, 548 U.S. 81, 89
5 (2006). “Proper exhaustion” refers to “using all steps the agency holds out, and doing so
6 properly (so that the agency addresses the issues on the merits).” *Id.* (emphasis in original)
7 (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)). Thus, “[s]ection 1997e(a)
8 requires an inmate not only to pursue every available step of the prison grievance process but
9 also to adhere to the ‘critical procedural rules’ of that process.” *Reyes v. Smith*, 810 F.3d 654,
10 657 (9th Cir. 2016) (quoting *Woodford*, 548 U.S. at 90). “[I]t is the prison’s requirements, and
11 not the PLRA, that define the boundaries of proper exhaustion.” *Jones v. Bock*, 549 U.S. 199,
12 218 (2007).

13 In *Ross v. Blake*, the Supreme Court noted three instances where administrative
14 procedures were unavailable: First, “when (despite what regulations or guidance materials may
15 promise) it operates as a simple dead end—with officers unable or consistently unwilling to
16 provide any relief to aggrieved inmates.” For example, if a handbook directs inmates to submit
17 grievances to a particular administrative office, but in practice it disclaims the capacity to
18 consider those petitions. Second, “an administrative scheme might be so opaque that it becomes,
19 practically speaking, incapable of use. In this situation, some mechanism exists to provide relief,
20 but no ordinary prisoner can discern or navigate it.” This occurs, for example, “[w]hen rules are
21 ‘so confusing that ... no reasonable prisoner can use them[.]’” Third, “when prison
22 administrators thwart inmates from taking advantage of a grievance process through
23 machination, misrepresentation or intimidation.” *Ross v. Blake*, 578 U.S. 632, 643-44 (2016).

1 The Ninth Circuit characterized this as a “non-exhaustive” list. *Andres v. Marshall*, 867
2 F.3d 1076, 1078 (9th Cir. 2017), as amended August 7, 2017.

3 **2. Cardella**

4 Cardella argues that Plaintiff never filed a grievance about filing false charges against
5 him, citing Plaintiff’s grievance history report. (ECF No. 60-9.)

6 In his response, Plaintiff asserts that he did file a grievance against Cardella on
7 July 13, 2017, but prison officials refused to accept the grievance, and when he kited his
8 caseworker about it, she did not respond.

9 Plaintiff provides a copy of an informal level grievance dated July 13, 2017, where
10 Plaintiff states that on June 26, 2017, Cardella falsified an incident report against Plaintiff
11 claiming that Plaintiff made a fist at inmate Beard. Plaintiff claimed Cardella was trying to get
12 Plaintiff removed from the unit because Cardella had been targeting minorities. Plaintiff also
13 mentioned another inmate trying to start a fight with him on July 5, 2017, which Cardella
14 laughed at and ignored. Plaintiff believed that staff put the inmate up to it to make it look like
15 Plaintiff was getting into fights in the unit. Plaintiff reported the latter incident to Mason, who
16 did nothing. Plaintiff told another NDOC employee, Bell, about Cardella making the false report.
17 Plaintiff asked that he be given the false notice of charges, that the matter be turned over to the
18 Inspector General for investigation, and that his administrative claim be resolved. The grievance
19 was marked “not accepted.” (ECF No. 66-1 at 13-19.)

20 Plaintiff sent an inmate request form (known as a “kite”) to Caseworker Moyle on August
21 9, 2018, advising that his grievance had been returned as “not accepted” on the basis that it
22 contained more than one issue. Plaintiff explained that he was asserting a conspiracy, and in
23 order to make this claim he had to describe the events that formed the conspiracy. He argued that

1 if he submitted multiple grievances on each person involved in the conspiracy, the grievances
2 would be rejected for filing multiple grievances on the same issue. Plaintiff asked how he should
3 resolve the issue. There is no response to the kite. (ECF No. 66-1 at 25.)

4 Plaintiff has provided evidence that the grievance process was unavailable to him, and
5 Defendants did not provide any rebuttal to satisfy their ultimate burden of proof that Plaintiff
6 failed to exhaust administrative remedies. Therefore, Defendants' motion should be denied
7 insofar as they argue that Plaintiff failed to exhaust administrative remedies as to the retaliation
8 claim against Cardella.

9 **3. Lobato**

10 **a. First Amendment Legal Mail**

11 Lobato argues that Plaintiff did exhaust administrative remedies as to this claim because
12 he did not make it beyond the informal level of his grievance.

13 On November 7, 2017, Plaintiff filed grievance 20063057560 at the informal level
14 regarding the legal mail claim. (ECF No. 60-8 at 5, 7.) There is an improper grievance memo
15 dated November 22, 2017, advising Plaintiff that he was required to attach any supporting
16 documents for his claim, including the envelope which was the basis of his grievance. (*Id.* at 6.)
17 The memo instructed Plaintiff to correct the deficiency and re-submit the grievance at the same
18 level. (*Id.*) Plaintiff re-submitted the informal level grievance on March 25, 2018, stating that the
19 envelope/letter was sent to the FBI office as evidence of a federal crime and violation of AR 250.
20 (ECF No. 60-8 at 4.) There is another improper grievance memo dated May 17, 2018, which
21 again advises Plaintiff to attach the supporting envelope. (*Id.* at 2.)

22 Again, there is evidence that the grievance process was unavailable to Plaintiff. He was
23 instructed to submit the supporting documentation for his claim (the legal mail), but Plaintiff

1 asserted that he could not do so because he had sent the documents and envelope to the FBI as
2 evidence. As with Cardella, Defendants did not rebut the evidence that administrative remedies
3 were not available to Plaintiff. Therefore, Defendants' motion for summary judgment should be
4 denied insofar as they argue Plaintiff failed to exhaust his administrative remedies as to the First
5 Amendment legal mail claim against Lobato.

6 **b. Retaliation and Failure to Protect**

7 Lobato also argues that Plaintiff did not exhaust administrative remedies as to the
8 retaliation or failure to protect claims because he did not proceed past the first level of his
9 grievance.

10 Plaintiff filed grievance 20063058311, asserting he was assaulted on November 29, 2017,
11 and the guards watched the attack but did nothing to intervene. (ECF No. 60-12 at 3, 8-10.) The
12 informal response partially granted the grievance and said it would be forwarded to the Inspector
13 General's Office. (*Id.* at 7.)

14 Plaintiff filed a first level grievance, stating that Ward told him he had to wait 90 days
15 from the date he signed the informal response, for a response from the Inspector General's
16 Office. Ward told him there had not been a response within the 90 days, and instructed Plaintiff
17 to proceed with his first level grievance. In the first level grievance, Plaintiff asserted Peters and
18 Lobato stood by and watched the assault. (*Id.* at 5-6.) The first level response states: "3098: AR
19 740.03.6. An inmate who is dissatisfied with the response to a grievance at any level may appeal
20 the grievance to the next level, within the substantive and procedural requirements outlined
21 herein, *unless the action requested has already been Granted or Partially Granted at a lower*
22 *level.*" (*Id.* at 4, emphasis added.)

1 Defendants argue that Plaintiff failed to exhaust his administrative remedies even though
2 it is clear that he was precluded from proceeding further with the grievance by prison officials.
3 When Plaintiff tried to proceed to the first level, he was told he need not do so because his
4 grievance had been partially granted at the lower level.

5 Moreover, as Plaintiff points out, he did not receive a response from the Inspector
6 General's Office until after he filed this lawsuit and Magistrate Judge William Cobb ordered the
7 Attorney General's Office to obtain a response for Plaintiff from the Inspector General. (*See*
8 ECF No. 38; Inspector General's June 25, 2021 response at ECF No. 60-14.) To the extent
9 Defendants are arguing that Plaintiff had to wait (apparently indefinitely) for the Inspector
10 General's response before filing his lawsuit, the Ninth Circuit has held that "[w]hen prison
11 officials improperly fail to process a prisoner's grievance, the prisoner is deemed to have
12 exhausted available administrative remedies" because "prison officials have thwart[ed] inmates
13 from taking advantage of [the] grievance process, making that process unavailable." *Andres*, 867
14 F.3d at 1079 (internal quotation marks and citations omitted).

15 Notably, Magistrate Judge William Cobb (now retired) previously found administrative
16 remedies are unavailable in scenarios analogous to this: where the inmate is told at the informal
17 level that his claim is being referred to the Inspector General, but then the Inspector General's
18 investigation goes on indefinitely or is never initiated and the inmate does not receive a response.
19 *See* No. 3:16-cv-00553-MMD-WGC, 2018 WL 6594608, at *3-4 (D. Nev. Nov. 26, 2018),
20 report and recommendation adopted in 2018 WL 6591796 (D. Nev. Dec. 14, 2018); *Lafferty v.*
21 *Williams*, No. 3:16-cv-00279-RCJ-WGC, 2017 WL 8217698, at *7-8 (D. Nev. Dec. 6, 2017),
22 report and recommendation adopted in 2018 WL 1245500 (D. Nev. Mar. 9, 2018).

1 In sum, Defendants’ motion should be denied insofar as they argue Plaintiff failed to
2 exhaust administrative remedies as to the retaliation and failure to protect claims against Lobato.

3 **B. Mason**

4 **1. Free Exercise Clause**

5 “The First Amendment, applicable to state action by incorporation through the Fourteenth
6 Amendment...prohibits government from making a law prohibiting the free exercise [of
7 religion].” *Hartmann v. Cal. Dep’t of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013)
8 (citations and quotation marks omitted, alteration original). “The right to exercise religious
9 practices and beliefs does not terminate at the prison door. The free exercise right, however, is
10 necessarily limited by the fact of incarceration, and may be curtailed in order to achieve
11 legitimate correctional goals or to maintain prison security.” *McElyea v. Babbitt*, 833 F.2d 196,
12 197 (9th Cir. 1987) (per curiam); *see also O’Lone v. Estate of Shabazz*, 482 U.S. 342, 348
13 (1987); *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Hartmann v. Cal. Dept. of Corr. and Rehab.*,
14 707 F.3d 1114, 1122 (9th Cir. 2013); *Shakur v. Schriro*, 514 F.3d 878, 883-84 (9th Cir. 2008).

15 To implicate the Free Exercise Clause, a prisoner must first establish his belief is both
16 sincerely held and rooted in religious belief. *See Shakur*, 514 F.3d at 884-85. “The Free Exercise
17 Clause does not require plaintiffs to prove the centrality or consistency of their religious practice:
18 ‘It is not within the judicial ken to question the centrality of particular beliefs or practices to a
19 faith.’” *Jones v. Slade*, 23 F.4th 1124, 1145 (9th Cir. 2022) (quoting *Hernandez v. Comm’r of*
20 *Internal Revenue*, 490 U.S. 680, 689 (1989)). The test is whether the plaintiff sincerely believes
21 the conduct at issue is consistent with his faith. *Id.* (citation omitted).

22 Next, “a person asserting a free exercise claim must show that the government action in
23 question substantially burdens the person’s practice of her religion.” *Jones v. Williams*, 791 F.3d

1 1023, 1032 (9th Cir. 2015) (citing *Graham v. C.I.R.*, 822 F.2d 844, 851 (9th Cir. 1987), *aff'd sub*
2 *nom. Hernandez*, 490 U.S. at 699).

3 “Once a claimant demonstrates that the challenged regulation impinges on his sincerely
4 held religious exercise, the burden shifts to the government to show that the regulation is
5 ‘reasonably related to legitimate penological interests.’” *Jones*, 23 F.4th at 1144 (quoting *Walker*
6 *v. Beard*, 789 F.3d 1125, 1138 (9th Cir. 2015)).

7 In analyzing the legitimacy of regulation of a prisoner’s religious expression, the court is
8 instructed to utilize the “reasonableness” factors set forth in *Turner v. Safley*, 482 U.S. 78 (1987).
9 *See O’Lone*, 482 U.S. at 349; *Jones*, 791 F.3d at 1032; *Shakur*, 514 F.3d at 884. The *Turner*
10 factors are: (1) is there a “‘valid, rational connection’ between the prison regulation and the
11 legitimate governmental interest put forward to justify it”; (2) “whether there are alternative
12 means of exercising the right that remain open to prison inmates”; (3) “the impact
13 accommodation of the asserted constitutional right will have on guards and other inmates, and on
14 the allocation of prison resources generally”; and (4) the “absence of ready alternatives” and “the
15 existence of obvious, easy alternatives.” *Turner*, 482 U.S. at 89-91; *see also O’Lone*, 482 U.S. at
16 349.

17 Mason does not argue Plaintiff lacks a sincerely held religious belief in participating in
18 the Native American sweat lodge. Instead, Mason appears to argue that he did not substantially
19 burden Plaintiff’s free exercise of his religion because there is no evidence he dissuaded other
20 staff members from becoming the Native American sponsor.

21 It is undisputed that Mason volunteered as the staff Native American sponsor for three
22 years, and then ceased volunteering as such. Plaintiff takes issue with the reason why Mason
23

1 ceased doing so, but that is not material to whether Mason dissuaded other staff members from
2 volunteering to be the Native American sponsor.

3 Plaintiff tried to get a staff member named Carvoth to sponsor the Native American
4 inmates, but Mason told Carvoth things to dissuade him from doing so. (ECF No. 66 at 16 ¶ 4.)
5 In dissuading other staff members from becoming the Native American sponsor, Plaintiff
6 contends that it interfered with his right to participate in the sweat lodge because without a
7 sponsor, the Native Americans could not get firewood for the sweat lodge. Mason's declaration
8 states that he stopped volunteering as the Native American sponsor, but he does *not* specifically
9 rebut that he dissuaded others from becoming the sponsor.

10 Mason appears to argue that he did not burden Plaintiff's religious practice related to lack
11 of access to firewood. Mason's declaration states that it is his understanding that all religious
12 firewood is donated by an outside sponsor and this person donates the firewood to the Stewart
13 Camp, and if wood is available, the donated wood can be brought into the institution by a
14 sponsor, an institution chaplain and/or a search and escort officer. (Mason Decl., ECF No. 60-3
15 at 3 ¶¶ 7-8.) This does not address any specific policy or practice of the donation and/or use of
16 firewood for the Native American sweat lodge at NNCC.

17 In sum, the court finds a genuine dispute of material fact exists as to whether Mason
18 substantially burdened Plaintiff's access to the sweat lodge and summary judgment should be
19 denied as to Plaintiff's First Amendment Free Exercise Clause claim.

20 **2. Equal Protection Clause**

21 "The Equal Protection Clause requires the State to treat all similarly situated people
22 equally." *Shakur v. Schriro*, 514 F.3d 878, 891 (9th Cir. 2008) (citing *City of Cleburne v.*
23 *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)). To prevail on an Equal Protection claim under

1 § 1983, the plaintiff must establish that “the defendants acted with an intent or purpose to
2 discriminate against [him] based upon membership in a protected class.” *Hartmann*, 707 F.3d at
3 1123 (quotation marks and citation omitted).

4 “[T]he Equal Protection Clause entitles each prisoner to ‘a reasonable opportunity of
5 pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to
6 conventional religious precepts.’” *Shakur*, 514 F.3d at 891 (quoting *Cruz*, 405 U.S. at 322).
7 “This does not mean, however, that all prisoners must receive identical treatment and resources.”
8 *Hartmann*, 707 F.3d at 1123 (citing *Cruz*, 405 U.S. at 322 n. 2.; *Ward*, 1 F.3d at 880; *Allen v.*
9 *Toombs*, 827 F.2d 563, 568-69 (9th Cir. 1987)).

10 Plaintiff filed grievance 20063048947 on May 23, 2017. He asserted that on
11 May 19, 2017, Mason said in front of other inmates that all Native American inmates at NNCC
12 were “foul” and “dirty.” Mason yelled racist and derogatory comments directed toward
13 Plaintiff’s race and religion. Mason also told Plaintiff that any grievance filed against him would
14 not go anywhere and any inmate that complains or grieves him would be removed from NNCC
15 and lose their job and property. (ECF No. 60-2 at 3, 12-14.)

16 The response states: “[P]er your conversation with Lt. Bell you stated that C/O Mason
17 has been professional when working with the yard labor crew, and that you feel this grievance
18 has been resolved.” (*Id.* at 2.)

19 Plaintiff filed a first level grievance stating that the response to the informal level
20 grievance was misleading and it took Plaintiff’s statement (to Bell) out of context. Plaintiff
21 clarified that his grievance was addressing discrimination against him and other Native
22 Americans at NNCC, and was not about the yard labor crew. (*Id.* at 9, 19.) The first level
23 response states that Mason responded that he previously had been the staff sponsor for the Native

1 Americans and made the decision to cease doing so because too many Native Americans had
2 “come up dirty,” meaning inmates tested positive for prison-made alcohol and narcotics. The
3 grievance was denied, finding no evidence Mason made any discriminatory remarks. (*Id.*)

4 At the second level, Plaintiff disagreed with the response and said he never “came up
5 dirty” on any tests in 20 years at NDOC. (*Id.* at 5, 6-7.) The second level response reiterates the
6 response to the first level. (*Id.* at 4.)

7 Plaintiff alleges that Mason inhibited Plaintiff’s ability to find a sponsor for his Native
8 American religion because Mason did not like Native Americans or their religion.

9 Mason argues there is no evidence that he dissuaded other staff from volunteering as the
10 Native American sponsor. He further contends there is no evidence he does not like Native
11 Americans. He points out that he served as the Native American sponsor for three years, until he
12 quit because the Native American population was violating NDOC policies when they were
13 caught intoxicated and fighting. (Mason Decl., ECF No. 63-1 at 3 ¶¶ 5, 9-11.) Mason also denies
14 making any racist or derogatory statements. (*Id.* ¶ 12.) Mason asserts that Plaintiff was not
15 treated differently than any other Native American inmates, as they were allowed to practice
16 their religion other than participating in the sweat ceremony, and all religions have to get a
17 sponsor.

18 The court finds there are various disputed material facts that require denial of Mason’s
19 motion for summary judgment as to the equal protection claim. First, there is a dispute as to
20 whether Mason discriminated against Plaintiff based on his being Native American. Mason
21 maintains that when he said “dirty,” he was referring to Native Americans testing positive for
22 prison-made alcohol or narcotics. Elsewhere he mentions that they had violated institutional
23 policies or were caught fighting. Plaintiff, on the other hand, is adamant that Mason called him,

1 as a Native American, and his religion, “dirty” and “foul.” Plaintiff asserts the term “dirty” has
2 been used against Native Americans for more than 100 years, and Mason used those terms in a
3 racist and derogatory manner. (Pl. Decl., ECF No. 66 at 16 ¶ 1.)

4 Next, as was pointed out above, there is an additional dispute as to whether Mason
5 engaged in the discriminatory conduct of dissuading others from volunteering as the Native
6 American sponsor. Finally, there is a dispute as to whether this had an impact on Plaintiff’s
7 ability to practice his religion (*i.e.*, obtain firewood for the Native American sweat lodge).

8 As such, Mason’s motion for summary judgment should be denied as to Plaintiff’s equal
9 protection claim.

10 **3. Retaliation**

11 Plaintiff alleges Mason retaliated against him by having Plaintiff fired from his job.

12 "Section 1983 provides a cause of action for prison inmates whose constitutionally
13 protected activity has resulted in retaliatory action by prison officials." *Jones v. Williams*, 791
14 F.3d 1023, 1035 (9th Cir. 2015); *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). Such a
15 claim consists of the following elements: "(1) An assertion that a state actor took some adverse
16 action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action
17 (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not
18 reasonably advance a legitimate correctional goal." *Jones*, 791 F.3d at 1035 (quoting *Rhodes v.*
19 *Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005)).

20 "The First Amendment guarantees a prisoner a right to seek redress of grievances from
21 prison authorities as well as a right of meaningful access to the courts." *Id.* (citing *Bradley v.*
22 *Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995)).

1 Plaintiff filed grievance 20063050920 at the informal level on June 22, 2017, asserting
2 that Mason gave false and misleading information to Prison Industries on May 22, 2017, by
3 falsely stating that Plaintiff had been involved in a fight. As a result of Mason's false statement,
4 Plaintiff's employment was terminated. Plaintiff claims this was done in retaliation for Plaintiff
5 making a formal complaint against Mason about racial/religious discrimination. (ECF No. 60-5
6 at 17-18.) The response to the informal level grievance states that Ms. Byington (from Prison
7 Industries) actually reported that Mason had recommended Plaintiff to work in Prison Industries.
8 In addition, a person named Matt Brown was considering hiring Plaintiff, but Mr. Bill Quenga
9 did not approve hiring Plaintiff. Ms. Byington was going to hire Plaintiff, but said she was told
10 by one of her workers in the bindery that Plaintiff was involved in a fight, so she took him off
11 her list. As such, Plaintiff was never hired in Prison Industries. (*Id.* at 16.)

12 In his first level grievance, Plaintiff disputed the version of events set forth in the
13 informal level response. Plaintiff claimed that Mason never recommended that he work in Prison
14 Industries. Instead, Plaintiff applied to work in the finish shop because inmates in that
15 department had asked him to do so. Mason came to sit in on Plaintiff's interview and had
16 Mr. Quenga ask if Plaintiff was a Native American, and then asked if Plaintiff drank and said all
17 Native Americans are drunks. Nevertheless Mr. Brown agreed to hire Plaintiff. Ms. Byington
18 then asked Plaintiff if he would work for her, and Plaintiff told her he would have to ask
19 Mr. Brown. Mr. Brown said Ms. Byington could hire Plaintiff. Plaintiff maintained he was never
20 in a fight, and it was Mason who told this story to Prison Industries, which was why he was not
21 allowed to work there. (*Id.* at 21-23.)

22 The first level response repeated that Mason was present during the interview because he
23 was recommending Plaintiff for the position. The response acknowledges that Plaintiff was

1 placed on the shop list, but advised that being placed on the approved list does not guarantee the
2 assignment. In June 2017, Ms. Byington needed workers and Plaintiff was referred, but Plaintiff
3 received an “OIC” on June 20, 2017, for a MJ 25 threat, which was later reduced to G6 for
4 fighting. As such, Plaintiff was not considered for placement in the book bindery and was
5 suspended from the list. (*Id.* at 9.)

6 Plaintiff submitted a second level grievance, stating that the MJ 25 happened in June of
7 **2016**, not in 2017. (*Id.* at 6-7.) The second level response reiterates the first level response, but
8 adds that a review of NOTIS reflects that the OIC was dismissed. (*Id.* at 2.)

9 According to Mason, in 2017, Plaintiff was an inmate worker with yard labor under
10 Mason’s supervision. (Mason Decl., ECF No. 63-1 at 3 ¶ 13.) In May of 2017, Plaintiff applied
11 to work within Prison Industries. (*Id.* ¶ 14.) Mason escorted Plaintiff to his first interview and sat
12 in on the interview to give a recommendation for the position; however, the position was filled
13 by another worker. (*Id.* ¶¶ 15-16.) In June of 2017, Plaintiff had a second interview for a
14 different position in the bindery shop. (*Id.* ¶ 17.) Plaintiff had been considered for the position,
15 but he was found to have been involved in “the Unit 10 altercation” and was given a notice of
16 charges. To work in Prison Industries, an inmate has to have 90 days of no misconduct, and
17 Mason says this is why Plaintiff did not get the second position in Prison Industries. (*Id.* at 4 ¶¶
18 18-20.)

19 Plaintiff’s inmate disciplinary report shows there was a *dismissed* G6 charge for fighting
20 on June 28, 2017, but the last guilty finding of fighting is from June 20, 2016. (ECF No. 60-15 at
21 2.) Plaintiff sent a kite on May 23, 2017, to the Unit 10 caseworker, Buchanan, asking whether
22 there were any disciplinary reports in the last 60 days. Buchanan confirmed there was nothing on
23 Plaintiff’s record, and his last “OIC” was on June 20, 2016, for the G6 charge of fighting. (ECF

1 No. 66 at 92.) Plaintiff sent another kite to Mr. Shreckengost on May 24, 2017, claiming that
2 Mason had begun a campaign to drive him off the yard because Plaintiff had made a formal
3 complaint against him. He asserted that Mason had gone to Prison Industries and told them not to
4 hire Plaintiff. (ECF No. 66-1 at 2.)

5 Plaintiff argues that it was not until he filed the grievance against Mason for racism that
6 Mason made up the story that Plaintiff had been in a fight, which resulted in his not getting a job
7 in Prison Industries. (Pl. Decl., ECF No. 66 at 16 ¶ 2.)

8 First, there is a genuine dispute between the parties as to whether Mason took adverse
9 action against Plaintiff, *i.e.*, whether he told Prison Industries that Plaintiff was involved in a
10 fight so Plaintiff would not be considered for employment. There is also a dispute as to whether
11 Plaintiff was involved in any fight in June of 2017. Defendants point to the charges filed by
12 Cardella, but as will be discussed further below, Plaintiff disputes that charge, and the charge
13 was ultimately dismissed.

14 Assuming Mason did tell Prison Industries Plaintiff had been involved in a fight,
15 Plaintiff also raises a genuine dispute as to whether Mason did this because of Plaintiff's
16 protected conduct: filing the grievance against Mason for discrimination. Circumstantial
17 evidence of retaliatory motive may include proximity in time between the protected speech and
18 the alleged retaliation. *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009) (citation omitted).
19 Plaintiff's complaint about Mason discriminating against him and the interviews with prison
20 industries took place in close proximity to each other. Moreover, when Plaintiff filed his
21 grievance against Mason for discrimination, he specifically claimed that Mason told him that any
22 inmate that complains or grieves him will be removed from NNCC and will lose their *job* and
23 their property.

1 As such, Mason's motion for summary judgment should also be denied as to the
2 retaliation claim.

3 **C. Cardella**

4 Plaintiff alleges that Cardella retaliated against him by bringing false charges against
5 Plaintiff.

6 There is a notice of charges for fighting brought by Officer Cardella. Cardella's report
7 asserts that on June 26, 2017, Cardella was posted in Unit 10-B and observed Plaintiff engaged
8 in a verbal altercation with another inmate. Plaintiff was challenging the other inmate to follow
9 Plaintiff to the bathroom to fight. Plaintiff raised his fist threatening to strike the other inmate.
10 Cardella approached to try to get the inmates to calm down. Plaintiff told Cardella that he was
11 being disrespected and was going to teach the other inmate a lesson. Cardella told Plaintiff any
12 violence would result in him being locked up. Plaintiff said he did not care, and people better not
13 disrespect him. (ECF No. 60-5.) The charge was ultimately dismissed. (ECF No. 60-6.)

14 Cardella argues there is no evidence that he filed false charges against Plaintiff; instead,
15 Cardella reported what he observed.

16 Plaintiff, on the other hand, asserts that he submitted a grievance about discriminatory
17 retaliation by Mason on June 22, 2017, and on June 28, 2017, Cardella filed the false notice of
18 charges against him for the alleged fight on June 26, 2017. Plaintiff claims that this was done in
19 retaliation for the grievance against Mason, and in concert with Mason, to make it appear that
20 Plaintiff was in a fight so there would be justification for Plaintiff not getting the job in Prison
21 Industries.

1 While the parties dispute whether the charges against Plaintiff for the incident on June
2 26, 2017, were false, even assuming they were, there is no evidence in the record to demonstrate
3 that Cardella levied the charges against Plaintiff *because of* any protected conduct.

4 Plaintiff argues that *Cardella* falsified the charges because Plaintiff had filed a grievance
5 against *Mason* and that *Mason* and *Cardella* were acting in concert, but there is *no evidence* to
6 support this conjecture of a connection between *Mason*'s and *Cardella*'s conduct. A plaintiff's
7 mere speculation that there is a causal connection is not enough to raise a genuine dispute of
8 material fact. *See Wood v. Yordy*, 753 F.3d 899, 904 (9th Cir. 2014) (citations omitted)
9 (affirming grant of summary judgment where there was no evidence that defendants knew about
10 plaintiff's prior lawsuit, or that defendant's disparaging remarks were made in reference to the
11 prior lawsuit). Here, there is no evidence that *Cardella* knew about the grievance against *Mason*,
12 and no actual evidence that *Mason* and *Cardella* were working in concert against Plaintiff.

13 Therefore, the motion for summary judgment should be granted as to the retaliation claim
14 against *Cardella*.

15 **D. Lobato**

16 **1. Retaliation and Failure to Protect**

17 Under the Eighth Amendment, prison conditions should not "involve the wanton and
18 unnecessary infliction of pain" or be "grossly disproportionate to the severity of the crime
19 warranting imprisonment." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Although prison
20 conditions may be, and often are, restrictive and harsh, prison officials "must ensure that inmates
21 receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to
22 guarantee the safety of the inmates.'" *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)(quoting
23 *Hudson v. Palmer*, 486 U.S. 517, 526-27 (1984)).

1 “[P]rison officials have a duty...to protect prisoners from violence at the hands of other
2 prisoners.” *Farmer*, 511 U.S. at 833 (citations and quotations omitted); *see also Cortez v. Skol*,
3 776 F.3d 1046, 1050 (9th Cir.2015) (citing *Farmer*, 511 U.S. at 833). “Having incarcerated
4 ‘persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct,’
5 having stripped them of virtually every means of self-protection and foreclosed their access to
6 outside aid, the government and its officials are not free to let the state of nature take its course.”
7 *Farmer*, 511 U.S. at 833 (internal citations omitted). “Being violently assaulted in prison is
8 simply not ‘part of the penalty that criminal offenders pay for their offenses against society.’” *Id.*
9 at 834 (citing *Rhodes*, 452 U.S. at 347).

10 To establish a violation of this duty, the prisoner must establish that prison officials were
11 “deliberately indifferent” to serious threats to the inmate’s safety. *Farmer*, 511 U.S. at 834; *see*
12 *also Labatad v. Corrections Corp. of America*, 714F.3d 1155, 1160 (9th Cir. 2013) (citing
13 *Gibson v. County of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002)). Under the deliberate
14 indifference standard, a violation of the Eighth Amendment is only found when an objective and
15 subjective component are met. *See Farmer*, 511 U.S. at 834; *Labatad*, 714 F.3d at 1160.

16 First, “the deprivation alleged must be, objectively, sufficiently serious...; a prison
17 official’s act or omission must result in the denial of ‘the minimal civilized measures of life’s
18 necessities.’” *Farmer*, 511 U.S. at 834 (citations and quotations omitted). When a plaintiff
19 claims prison officials failed to take reasonable steps to protect, the plaintiff must show that “he
20 is incarcerated under conditions posing a substantial risk of serious harm.” *Id.* (citations
21 omitted).

22 Second, the inmate must satisfy the subjective element. This means that the prison
23 official must “know of and disregard an excessive risk to inmate health or safety; the official

1 must both be aware of facts from which the inference could be drawn that a substantial risk of
2 serious harm exists, and he must also draw the inference.” *Farmer*, 511 U.S. at 837. “Mere
3 negligence is not sufficient to establish liability.” *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir.
4 1998).

5 Plaintiff filed grievance 20063058311, stating that on November 29, 2017, he was
6 assaulted. Plaintiff said that he saw Correctional Officer Peters at the end of the hallway
7 watching, and Plaintiff walked down the hall and Peters and Lobato were standing outside of the
8 control room in the rotunda. Plaintiff stated that the inmate who attacked him had come to his
9 cell later and told Plaintiff that officers told him to assault Plaintiff and they would make sure
10 nothing happened. Plaintiff alleged that the guards watched the attack, but did nothing to
11 intervene. (ECF No. 60-12 at 3.) In his first level grievance, Plaintiff reiterated that Peters and
12 Lobato stood by and watched the assault. (*Id.* at 5-6.)

13 Defendants’ motion admits that the attack on Plaintiff was planned, but Lobato maintains
14 that he did not witness the assault, and it was only brought to his attention the following day.
15 (Lobato Decl., ECF No. 60-16 at 3 ¶¶ 5, 7.) The video shows Plaintiff being assaulted by the
16 other inmate, but it does not depict, one way or the other, whether there are correctional officers
17 down the hallway that witnessed the assault. The video shows people at the end of the hallway
18 during the assault, but it is unclear whether they are inmates or staff.

19 On the other hand, Plaintiff’s grievance, filed the day after the assault, claims that Peters
20 and Lobato witnessed the incident. Plaintiff reiterates this in his declaration. (ECF No. 66 at 16 ¶
21 10.) Plaintiff also provides the declaration of inmate Burgess, who identifies himself as the
22 inmate in the video who comes out of his cell and helps Plaintiff up. Burgess states that when he
23 went out of his cell into the hallway and saw Plaintiff being assaulted, he noticed officers who

1 either turned their heads or looked to the floor, but did nothing to stop the assault and said
2 nothing. (ECF No. 66-1 at 52.)

3 There is a genuine dispute of material fact as to whether Lobato witnessed the assault and
4 failed to intervene to protect Plaintiff. Therefore, the motion for summary judgment should be
5 denied as to the Eighth Amendment failure to protect claim against Lobato.

6 With respect to the retaliation claim, Lobato states he has never prompted an attack on
7 any inmate. (ECF No. 60-16 ¶ 9.) The only evidence Plaintiff offers in response is a statement
8 from the inmate who assaulted him that unidentified officers told him to assault Plaintiff.
9 The statement from the aggressor inmate is inadmissible hearsay. Plaintiff does not provide any
10 other evidence to support his claim that Lobato orchestrated the attack against him in retaliation
11 for filing grievances. Therefore, summary judgment should be granted as to the retaliation claim
12 against Lobato.

13 **2. First Amendment Legal Mail**

14 The Ninth Circuit has held that the First Amendment protects an inmate's right to be
15 present when his civil legal mail is opened. *Hayes v. Idaho Corr. Ctr.*, 849 F.3d 1204, 1211 (9th
16 Cir. 2017).

17 On November 7, 2017, Plaintiff filed a grievance (20063057560) stating that he received
18 legal mail from an attorney at the ACLU on October 30, 2017, regarding case 3:16-cv-00407-
19 MMD-VPC. Plaintiff claimed that the legal mail had been opened prior to his receiving it and
20 was delivered as "personal mail." He cited AR 250, which requires legal mail from attorneys to
21 be opened in front of the inmate and the inmate must sign the legal mail log. (ECF No. 60-8 at 5,
22 7.)
23

1 Plaintiff did not attach any supporting documentation to the grievance; therefore, Lobato
2 contends Plaintiff cannot prove there is evidence that this incident occurred.

3 Plaintiff states in his declaration that Lobato opened his legal mail outside of his
4 presence. (ECF No. 66 at 16 ¶ 9.)

5 Lobato does not argue that he did not open Plaintiff's legal mail outside of Plaintiff's
6 presence. Instead, he claims Plaintiff has no evidence to support this claim. While Plaintiff may
7 not have the envelope and documentation itself because he sent it to the FBI as evidence, his own
8 declaration asserts that Lobato opened his legal mail when Plaintiff was not present. This is
9 sufficient to create a genuine dispute of material fact to defeat Lobato's motion for summary
10 judgment.

11 In sum, Lobato's motion for summary judgment should be denied as to the First
12 Amendment legal mail claim.

13 **E. Qualified Immunity**

14 Defendants argue they are entitled to qualified immunity because they did not violate any
15 constitutional right, and to the extent the court concludes otherwise, such right was not clearly
16 established.

17 "In evaluating a grant of qualified immunity, a court considers whether (1) the state
18 actor's conduct violated a constitutional right and (2) the right was clearly established at the time
19 of the alleged misconduct." *Gordon v. County of Orange*, 6 F.4th 961, 967-68 (9th Cir. 2021)
20 (citing *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001), *overruled in part by Pearson v. Callahan*,
21 555 U.S. 223 (2009)).

1 With respect to the claims that the court is recommending proceed, when the facts are
2 viewed in the light most favorable to Plaintiff, a fact finder could determine that Plaintiff's
3 constitutional rights were violated.

4 Moreover, the authority cited above demonstrates it was clearly established that an
5 official who substantially burdens a Plaintiff's religious exercise when the reason for doing so is
6 not reasonably related to a legitimate government interest violates the Free Exercise Clause; an
7 official who acts with an intent or purpose to discriminate against an inmate based on his
8 membership in a protected class violates the Equal Protection Clause; an official that knows of
9 and disregards a risk to an inmate's safety violates the Eighth Amendment; an official who opens
10 legal mail outside the inmate's presence violates the First Amendment; and, there is a
11 constitutional right to pursue grievances without being retaliated against.

12 Therefore, Defendants are not entitled to qualified immunity.

13 **IV. RECOMMENDATION**

14 IT IS HEREBY RECOMMENDED that the District Judge enter an order **GRANTING**
15 **IN PART AND DENYING IN PART** Defendants' motion for summary judgment (ECF No.
16 60) as follows:

17 (1) The motion should be **DENIED** insofar as Defendants argue that Plaintiff failed to
18 exhaust administrative remedies; that they are entitled to qualified immunity; as to the First
19 Amendment Free Exercise Clause, Equal Protection clause and retaliation claims against Mason;
20 as to the Eighth Amendment failure to protect and First Amendment legal mail claims against
21 Lobato.

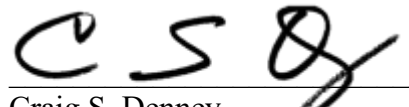
22 (2) The motion should be **GRANTED** as to the retaliation claims against Cardella and
23 Lobato.

1 The parties should be aware of the following:

2 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
3 this Report and Recommendation within fourteen days of being served with a copy of the Report
4 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s
5 Report and Recommendation” and should be accompanied by points and authorities for
6 consideration by the district judge.

7 2. That this Report and Recommendation is not an appealable order and that any notice of
8 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
9 until entry of judgment by the district court.

10
11 Dated: August 29, 2022

12 
13 Craig S. Denney
14 United States Magistrate Judge
15
16
17
18
19
20
21
22
23